



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT MOMBASA**

**CIVIL SUIT No. 4 OF 2016**

**CAMPUS HOSTELS LIMITED.....PLAINTIFF**

**VERSUS**

**1. HOUSING FINANCE COMPANY LTD.....1st DEFENDANT**

**2. TAIFA AUCTIONEERS.....2nd DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 16th July, 2019 brought pursuant to Order 40 Rules 1, 2, 3, and 4, Order 51 Rule 1 of Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010. The Applicant seeks to be granted orders that:-

*a) THAT service of the application is dispensed with and the same is heard ex-parte in the first instance.*

*b) THAT pending the hearing and determination of this application inter-parties, the Defendants by themselves or through their agents or servants be restrained by way of a temporary injunction from selling by public auction or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as **MOMBASA/BLOCK XVII/1585**.*

*c) THAT pending the hearing and determination of this suit, the Defendants by themselves or through their agents or servants be restrained by way of an injunction from selling by public auction or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as **MOMBASA/BLOCK XVII/1585**.*

*d) THAT the costs of this application be in the cause.*

2. The application is premised on the grounds that the Defendants unlawfully advertised the suit property for sale by public auction and that it was done so without the requisite statutory Notice and Notification of Sale. Further that the first Defendant had not obtained the Current Valuation Report of the property that the business conducted at the suit property has remained closed for two years including the closing of its postal address.

3. It is further supported by supporting affidavit of Moses Waweru Ndung'u dated 16th July, 2019 and a further affidavit dated 7th August, 2019. Those two affidavits reiterate the grounds on the face of the application.

4. The Defendants are opposed to the application and in doing so they rely on a Replying Affidavit sworn on 2nd August 2019 by Amos Wachira Mwangi as well as Grounds of Opposition dated 17th July, 2019. In both documents it is contended that the Defendant did carry out a current forced sale valuation and that as a matter of fact, the 1st Defendant instructed Centenary Valuers Limited and obtained a forced sale valuation report dated 17th May, 2019. Finally that there is no evidence suggesting that the 1st Defendant has authorized the sale of the Suit Property at any price less than 25% of the open market value and that as matter of practice, the 1st Defendant does not allow any property to be sold at any price below the forced sale value.

5. As drafted and filed, prayers **a & b** have been spent leaving only the substantive prayer **c** and the consequential prayer **d**. I have perused the court file and noted that this Court dismissed the application by Notice of Motion dated 21st October, 2016 which sought inter-alia that the Defendants by themselves or through their or servants be restrained by way of an Injunction from selling by public auction on 27th October 2016 or otherwise, disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as MOMBASA BLOCK XVII/1585 pending hearing and determination of the said applications and or the suit.

6. By yet another application dated 16th July, 2019 the Plaintiff sought among other prayers, an order of Injunction restraining the

Defendants from selling by public auction or otherwise disposing, selling, transferring, alienating, charging or in any other way dealing with the parcel of land known as MOMBASA/BLOCK/XVII/1585. Both applications were dealt with on the merits by the court and determinations rendered. Accordingly, I must, from the word go, establish if the application is properly before the court

### **Analysis and Consideration**

7. From the paper filed by the plaintiff there has not demonstrated any change of circumstances and facts since determined the two previous applications. The decisions thereby arrived remain unchallenged but intact.

8. There has been no Appeal or Review of the holdings made by this court in the rulings delivered on the 5th September, 2016 and on the 26th October 2016. The Plaintiff seems not to be learning from the pronouncements made by this court but has been filing applications for injunction one after another. To this court, it has performed its duty to parties and has become *functus officio*.

9. This court in the ruling delivered on 26th October, 2016, took the same position when it held that ***‘Litigation must come to an end and once a court determines an issue, it is not open to it to revisit the same issue unless by an application for review and only when the set thresholds have been met.’***

10. It is trite law that parties ought not to litigate in piecemeal and/or instalment basis as otherwise action will lead to res-judicata. Having on two occasions dealt with applications seeking orders of Injunction by the same Plaintiff over the same subject matter and against the same Defendants, this court has no jurisdiction to hear and determine the application dated 16th July, 2019. This holding is guided by the finding in **Uhuru Highway Developers Ltd vs Central Bank of Kenya and 2 others [1996]eKLR** where the court held that;

***‘Once an application for Injunction within a suit has been heard and determined under the principles as laid down in GIELLA VS CASSMAN BROWN a similar application cannot be brought.’***

11. This holding is guided by the finding in **Uhuru Highway Developers Ltd vs Central Bank of Kenya and 2 others [1996]eKLR** where the court held that, ***‘Once an application for Injunction within a suit has been heard and determined under the principles as laid down in GIELLA VS CASSMAN BROWN a similar application cannot be brought’.***

12. I do find that the Application brought by the Plaintiff flies on the face of the principle of res judicata as coded in Section 7 of the Civil Procedure Act which forbids the court from ***‘trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and final decided by such court’.*** It is for this reason that the Application must fail.

13. In **Independent Electoral & Boundaries Commission vs Maina Kiai and 5 others [2017] eKLR**, the court of appeal reiterated the rationale for the rule in the following words:-

***‘The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in public interest for swift, sure and certain justice.’***

14. Having said the above, it is the finding of this court that the application dated 16th July, 2019 deserves only one fate, dismissal with costs. Accordingly, I dismiss the application dated 16th July, 2019 with costs to the Defendants.

Dated and signed at Mombasa this 20th day of April 2020

**P.J.O. OTIENO**

**JUDGE**

Signed and delivered at Mombasa this 23rd April, 2020

**E. Ogola Judge**